



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Ames-Avon Industries  
File: B-227839.3  
Date: July 20, 1987

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### DIGEST

1. General Accounting Office dismissed protest which raises an issue already decided by a court of competent jurisdiction.
2. Protest objecting to contracting agency's decision to exclude the protester from procurement for production of chemical/biological masks based on determination that protester's mask did not comply with agency's technical requirements is untimely when not filed within 10 days after protester knew or should have known, based on notice from agency and publication in Commerce Business Daily, that it had been eliminated from the competition.
3. General Accounting Office (GAO) will not consider the merits of an untimely protest by invoking the significant issue exception in GAO Bid Protest Regulations where the protest does not raise an issue of first impression that would be of widespread interest to the procurement community.

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### DECISION

Ames-Avon Industries protests the Army's decision to exclude it from competing for award of a contract to produce chemical/biological masks under request for proposals (RFP) No. DAAAL5-87-R-0035. We dismiss the protest.

In 1982, as the first phase of a program to develop a new design for the chemical/biological mask used by soldiers, the Army awarded contracts to three United States firms to design and produce a prototype mask; in the second phase of the program, the Army awarded contracts to two of the three firms for production test items and development of a technical data package for the new design. At the same

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time, the Army also was evaluating another version of the mask manufactured by a British company, Avon Industrial Polymers; the protester, Ames-Avon, is a United States licensee of Avon. The RFP at issue here is for production of masks based on the new design.

In December 1986, the Army determined that Avon would not be allowed to participate in the procurement for production of the masks because its version of the mask failed during testing to meet the Joint Service Operational Requirements (JSOR), the technical requirements for the new mask. In a "fact sheet" prepared by the Army regarding the decision to eliminate Avon from the production procurement, a copy of which was submitted by Ames-Avon with the protest, the Army stated that it first advised Ames-Avon of its decision on January 6, 1987.

On January 12, the Army published a notice in the Commerce Business Daily (CBD) that the competition for production of the masks would be limited to the two United States firms which had participated in the second phase of the development program. In a justification dated January 15, the Army relied on 10 U.S.C. § 2304(c)(1) (Supp. III 1985), as amended by the 1987 National Defense Authorization Act, Pub. L. No. 99-661, as authority for restricting the competition. Before the 1987 amendment, 10 U.S.C. § 2304(c)(1) authorized using other than competitive procedures where the needed product or services are available from "only one responsible source"; as amended, the provision extends the authority to restrict competition to cases such as this one where, in the Army's view, the needed products or services are available from "only a limited number of responsible sources." The amendment did not take effect, however, until 180 days after its enactment on November 14, 1986, and the Army subsequently conceded that it was not in effect on January 15, when the initial justification for restricting competition for the mask procurement was issued. Consequently, on February 4, the Secretary of the Army issued a second justification for restricting the competition, based on his determination under 10 U.S.C. § 2304(c)(7) that it was necessary in the public interest to use other than competitive procedures.

In its protest, Ames-Avon challenges (1) the Army's reliance on 10 U.S.C. §§ 2304(c)(1) and (c)(7) to justify limiting the procurement to the two United States firms; and (2) the Army's evaluation of its mask for compliance with the JSOR, arguing that the mask's deficiencies are relatively minor and did not justify Avon's exclusion from the competition.

Ames-Avon's primary contention concerns the validity of the Army's reliance on 10 U.S.C. §§ 2304(c)(1) and (c)(7) to restrict the competition. The same issue was raised in a recent protest by Mine Safety Appliances Company (MSA), a firm which participated in the first stage of the mask development program but was excluded from the production procurement. Mine Safety Appliances Co., B-227839, July 8, 1987, 87-2 CPD ¶ \_\_\_\_\_. As explained in our decision on MSA's protest, on January 28, MSA filed suit in the U.S. District Court for the Eastern District of Virginia seeking a declaratory judgment and injunctive relief preventing the Army from excluding MSA from the mask procurement. MSA challenged the Army's action on several grounds, including its contention that excluding MSA violated the requirement for full and open competition in the Competition in Contracting Act of 1984 (CICA) and the implementing regulations. On May 1, the court granted the government's motion for summary judgment and dismissed MSA's complaint. The transcript of the court's ruling issued from the bench indicates that the court rejected each of the arguments MSA raised; with regard to the alleged violation of CICA, the court found that the Army "properly invoked the public interest exception" in 10 U.S.C. § 2304(c)(7). MSA has appealed the decision to the U.S. Court of Appeals for the Fourth Circuit.

We dismissed MSA's protest because it raised one of the same issues involved in the lawsuit--MSA's contention that the Army improperly restricted the competition in reliance on 10 U.S.C. §§ 2304(c)(1) and (c)(7)--and the court's decision on that issue is binding on our Office. See Bid Protest Regulations, 4 C.F.R. § 21.9(a) (1986); Santa Fe Corp., 64 Comp. Gen. 429 (1985), 85-1 CPD ¶ 361, aff'd on reconsideration, B-218234.3, May 3, 1985, 85-1 CPD ¶ 499. Similarly here, Ames-Avon's challenge to the Army's decision to restrict the procurement involves the same issue as was decided by the court; since the court's decision is binding on our Office, we are barred from further consideration of the issue. See Monterey City Disposal Services, Inc., B-218624.3, Feb. 6, 1987, 87-1 CPD ¶ 128.

To the extent that Ames-Avon challenges the Army's technical evaluation of its mask, the protest clearly is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), protests involving issues such as this one must be filed within 10 days after the basis of protest is known or should have been known. Here, as noted above, the Army has stated, and Ames-Avon does not dispute, that Avon first was told of its exclusion from the competition and the Army's reasons for its decision on January 6. The Army then published the CBD notice on January 12, confirming that the procurement would be limited to the two domestic firms. Thus, at a

minimum, Ames-Avon was on notice of this basis of its protest by mid-January, but did not file the protest with our Office until July 6, approximately 6 months later.

In documents submitted with the protest, Ames-Avon included correspondence from early 1987 between the Army and several members of Congress who questioned the Army's decision to eliminate Avon and its United States affiliate, Ames-Avon, from the competition. Ames-Avon argues based on this correspondence that the Army's decision to exclude it from the competition was unsettled even after the CBD notice was published, and that in fact the decision was not final until June 24, when award was made under the RFP. We disagree. Ames-Avon's protest documents include a letter dated April 3 from the Secretary of Defense stating conclusively that Avon would be excluded from the competition because of its failure to meet the JSOR. Thus, even assuming that the Army was reconsidering Avon's exclusion after publication of the CBD notice in response to the Congressional inquiries, it should have been clear at the latest as of the April 3 letter, approximately 3 months before the protest was filed, that the Army's decision to exclude Avon was firm.<sup>1/</sup>

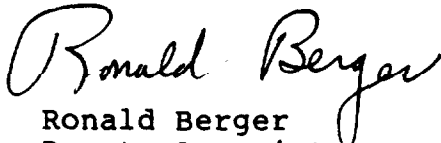
Ames-Avon also requests that we consider its challenge to the Army's technical evaluation under 4 C.F.R. § 21.2(c), which provides that an untimely protest may be considered where it raises an issue significant to the procurement system. In order to prevent the timeliness requirements from becoming meaningless, the significant issue exception is strictly construed and seldom used. The exception is limited to considering untimely protests that raise issues of widespread interest to the procurement community and which have not been considered on the merits in a previous decision. Alpha Parts & Supply, B-225401, Jan. 15, 1987, 87-1 CPD ¶ 62. We have considered numerous protests concerning the issue Ames-Avon raises, the propriety of an agency's technical evaluation of an offeror's proposal.

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<sup>1/</sup> Ames-Avon states that it did not have available to it "much of the information and many of the documents on which to support a protest" until July 3. Ames-Avon does not state what information regarding the technical evaluation it lacked. It also does not inform us of the efforts made to obtain the information. From our review of the backup documents submitted by the protester, it appears that it had sufficient data upon which to base a protest of the technical evaluation of the proposal long before July 3.

American Development Corp., B-224842, Jan. 7, 1987, 87-1  
CPD ¶ 26; GTE Government Systems Corp., B-222587, Sept. 9,  
1986, 86-2 CPD ¶ 276; The W.H. Smith Hardware Co., B-220531,  
Dec. 17, 1985, 85-2 CPD ¶ 681. Accordingly, we will not  
consider the issue under the significant issue exception to  
our timeliness rules.

The protest is dismissed.

  
Ronald Berger  
Deputy Associate  
General Counsel